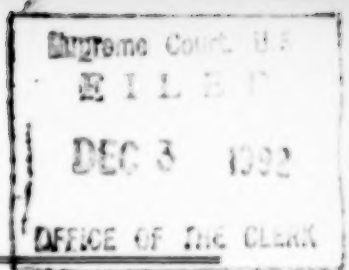


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No. 92-515



In The
Supreme Court of the United States

October Term, 1992

—◆—
STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

—◆—
On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

—◆—
REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

—◆—
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REPLY ARGUMENT

This reply brief primarily responds to the discussion contained in section III of respondent's brief. The petitioner will not reply to the discussions of *R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538 (1992), and *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), contained in sections I and II of respondent's brief. The arguments relating to these decisions are either addressed in the petition or merely serve to further highlight the need for an authoritative decision on the constitutional question presented.

ANALYSIS OF THE FIRST AMENDMENT QUESTION PRESENTED DOES NOT HINGE ON THE PARTICULAR INTERPRETATION GIVEN THE WORDS "BECAUSE OF" IN THE WISCONSIN STATUTE. RATHER, THIS CASE PRESENTS THE CORE FIRST AMENDMENT ISSUE COMMON TO OVER TWENTY OTHER STATE HATE CRIMES PENALTY ENHANCEMENT STATUTES.

The petition in this case presents a core First Amendment question going to the heart, not only of the Wisconsin penalty enhancement statute, but also of similar statutes of many other states. That question is whether the First Amendment prohibits states from providing greater maximum penalties for crimes if a fact-finder determines that a criminal offender selected his or her crime victim because of the victim's race, color, religion or other specified status.

The petitioner readily admits that the particular wording of the Wisconsin statute and other state statutes may raise other legal questions. For example, even if this Court were to hold that the First Amendment does not prohibit consideration of biased selection in formulating criminal penalties, a particular statute might still be unconstitutionally vague or unconstitutionally overbroad.

The issue raised in section III of respondent's brief provides a good example of a non-core issue. Although he has not before asserted that the meaning of the phrase "because of" is unclear, respondent now contends that the lack of a state court interpretation of this phrase is an impediment to the resolution of the core constitutional issue presented here (respondent's brief at 18-19). Respondent asserts that it is not known with certainty whether the phrase "because of" requires 1) "but for" causation, 2) a showing that status is a "substantial factor" in victim selection, or 3) only a showing that status played a part in victim selection, no matter how small.

The petitioner believes the phrase "because of" in the Wisconsin statute has the same meaning it has in other Wisconsin anti-discrimination statutes. But even assuming the respondent is correct in asserting there is an open question as to the particular meaning of the phrase "because of," the separate and more fundamental First Amendment issue raised in the petition must be addressed.

The validity of the Wisconsin court's constitutional analysis does not turn on the particular meaning of "because of." It would come as a great surprise to the Wisconsin high court to learn that it issued a narrow decision based on a particular view of that phrase. Rather, the Wisconsin court intended to strike a fatal blow at the entire concept of penalty enhancement based on proof that the criminal selected his or her victim by reason of the victim's race or other status. Whether the victim's status played a major role in the selection process or a lesser role, the Wisconsin court has plainly held the penalty range may not be enhanced for that reason. Accordingly, if the Wisconsin court's First Amendment analysis were uniformly followed, all hate crime penalty enhancement statutes in the country, no matter how worded, would fall.

One other aspect of the respondent's brief warrants a reply. The respondent's position on the meaning of the phrase "because of" is inconsistent. In section III of his brief he asserts that no Wisconsin court has construed the phrase "because of." But in section I he asserted that the Wisconsin court has given an "authoritative construction . . . to the words, 'intentionally selects' and 'because of'" (respondent's brief at 6).

In reality, the inconsistency does not exist. A fair reading of the *Mitchell* decision reveals that the state court did not engage in statutory construction. The state court's statement that the statute is directed at "bigoted bias of the actor" is actually the court's constitutional conclusion that the statute violates the First Amendment because it is directed at the motive of the offender. In the state court's view, the statute violates the First Amendment because proof that a defendant selected a person for victimization "because of" the victim's status necessarily involves an inquiry into the motive of the defendant (see *Mitchell* decision in appendix to petition at A12 and A20).

Accordingly, the petitioner agrees with the respondent's assertion in section III of his brief that no Wisconsin court has endeavored to construe the phrase "because of." At the same time the petitioner maintains that a definitive construction of "because of" is unnecessary to the resolution of the core First Amendment issue raised in the petition.

CONCLUSION

This Court should decide the constitutional question presented clearly and cleanly by this case.

Respectfully submitted,

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